Oral Argument Not Yet Scheduled

Nos. 15-72700, 15-73222

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTRYWIDE FINANCIAL CORP., et al.

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on petition for review of Countrywide Financial Corporation (CFC), Countrywide Home Loans, Inc. (CHL), and Bank of America (BOA) (collectively, the Company), and the National Labor Relations Board's cross-application for enforcement, of an August 14, 2015 Board Order against the Company. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act (the

NLRA), 29 U.S.C. §160(a). The Board's Decision and Order, reported at 362 NLRB No. 165 (CER 1-17),[1] is final under Section 10(e) and (f) of the NLRA, 29 U.S.C. §160(e) and (f).

The Company filed its petition for review on August 28, 2015, and the Board cross-applied for enforcement on October 20, 2015. Both were timely because the NLRA imposes no time limit on such filings. On April 22, 2016, the Court accepted for filing a brief by the Chamber of Commerce (Amicus) as amicus curiae in support of the Company. This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the NLRA. Venue is proper under Section 10(f), because the unfair labor practices at issue were committed in California.

STATEMENT OF ISSUES

1. Did the Board reasonably find that the Company violated Section 8(a)(1) of the NLRA by enforcing an arbitration agreement in a manner that requires employees to waive their right to maintain class or collective actions in all forums, arbitral or judicial?

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[1] Citations are to Excerpts of Record (CER) filed with the Company's brief. References preceding a semicolon are to Board findings and references following it are to supporting evidence. "Br." cites are to the Company's opening brief to the Court, and "Amicus" cites are to the brief of amicus curiae Chamber of Commerce.

2. Did the Board reasonably find that the Company violated Section 8(a)(1) of the NLRA by imposing, as a condition of employment, an arbitration agreement that employees would reasonably read as restricting their right to file charges with the Board?

RELEVANT STATUTORY PROVISIONS

All relevant statutes are contained in the Statutory Addendum to this brief.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

CFC was a holding company which, through its subsidiaries, including CHL, provided banking, mortgages, and other real-estate finance-related services. (CER 1.) On July 1, 2008, BOA purchased CFC and became the parent company of CFC's subsidiaries, including CHL. (CER 13; 55.) CFC has since merged out of existence.

From about 2007 through March 31, 2009, CHL required applicants to electronically sign an agreement entitled "Mutual Agreement to Arbitrate Claims" (the Agreement) bearing the heading "Countrywide Financial." (CER 1, 3-6.) The Agreement states that it is between the "Company and the Employee" and defines the Company as "Countrywide Financial Corporation and all of its subsidiary and affiliated entities . . . and all successors and assigns and any of them." (*Id.*) The Agreement provides for mandatory arbitration of "all claims or controversies

arising out of, relating to or associated with the Employee's employment with the Company that the Employee may have against the Company[.]" (CER 14.) The Agreement states that it covers claims "including, but not limited to […] claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy." (*Id*.) The Agreement also states that "[n]othing in this Agreement shall be construed to require arbitration of any claim if an agreement to arbitrate such claim is prohibited by law." (CER 1.)

The Agreement requires all applicants for employment to select whether they agree or disagree to its terms. If an employee elects to "disagree," the Agreement states that the applicant "will not be able to move forward in the application process." (CER 2.) There is no language in the Agreement addressing whether arbitration may be conducted on a class or collective basis. (CER 2.)

Dominique Whitaker and John White applied to work for CHL in August 2007 and September 2008, respectively. (CER 1.) Both employees were hired after electronically checking "I agree" when presented with the Agreement. (CER 13.) Whitaker was employed until August 2008, and White was employed until about November 2009.

On June 16, 2009, Whitaker filed a putative class-action lawsuit in California state court, alleging that CFC and BOA violated minimum wage and overtime provisions of California state law and the Fair Labor Standards Act

(FLSA). (CER 3.) Following removal to the Central District of California, White was added as a plaintiff, and CHL as a defendant.

On August 22, 2011, the Company filed motions in the district court to stay the lawsuit and compel individual arbitration of White's and Whitaker's claims. (CER 217, 435.) Citing the Agreement, the Company argued in its motions that each employee "must be compelled to arbitrate his claims on an individual basis, and not be permitted to arbitrate on a class or collective basis." (CER 4; 236, 454.) The district court granted the motions to compel, but left to the arbitrator to decide whether the Agreement allowed class or collective proceedings in arbitration. (CER 3; 653-70.) The parties stipulated that, as of the date of the unfair-labor-practice hearing, no authority had yet decided that issue. (CER 3.)

II. PROCEDURAL HISTORY

After investigating charges filed by Whitaker's and White's attorneys, the Board's General Counsel issued a complaint against the Company alleging, among other things, that the Company's mandatory arbitration agreement violated Section 8(a)(1) of the NLRA.[2] Following a hearing, an administrative law judge issued a

[2] The Company erroneously implies that the charges were invalid because three attorneys, rather than Whitaker and White themselves, filed them. (Br. 7.) The NLRA places no restriction on who can file a charge. *See NLRB v. Indiana & Michigan Elec. Co.*, 318 U.S. 9, 17-18 & n.7 (1943); 29 U.S.C. §160(b). Nor is it material whether, as the Company claims, Whitaker and White lack standing to "assert their charge now." (Br. 27, n. 36.) Under Section 10(e) of the NLRA, the Board has standing to seek enforcement of its unfair labor practice order against

decision finding that CHL violated Section 8(a)(1) by maintaining an arbitration agreement that employees would reasonably believe prevents them from filing charges with the Board. The judge further found, however, that the Company did not unlawfully enforce the Agreement by filing a motion to stay and compel individual arbitration. (CER 12-17.) The judge also dismissed BOA and CFC from the complaint, finding that their relationship to the allegations was "too attenuated." (CER 15.)

III. THE BOARD'S CONCLUSIONS AND ORDER

In its Decision and Order, the Board (Chairman Pearce and Member Hirozawa, Member Johnson, dissenting), following its precedent set in *D.R. Horton Inc.*, 357 NLRB 2277 (2012), *enf. denied in relevant part* 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014), *enf. denied in relevant part* 808 F.3d 1013 (5th Cir. 2015), reversed the judge and found that the Company violated Section 8(a)(1) of the NLRA by enforcing the Agreement in a manner that would waive employees' right to maintain collective actions in all forums, arbitral and judicial. (CER 3-5.) The Board majority also found, in agreement with the judge, that the Company violated Section 8(a)(1) by maintaining the Agreement because employees would reasonably believe that it bars or restricts their right to file Board charges. (CER 1-

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the Company. *See Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264-66 (1940).

3.) The Board majority also determined that the judge improperly dismissed BOA and CFC as parties to the complaint and found that they, like CFC, also violated the Act by maintaining and enforcing the unlawful Agreement.[3]

To remedy those violations, the Board ordered the Company to cease and desist from the unfair labor practices found and from any like or related interference with employees' Section 7 rights. The Board also ordered the Company to rescind or revise the Agreement, notify all current and former employees that it has done so, notify the District Court that it will no longer enforce the Agreement and no longer opposes Whitaker and White's lawsuit on the basis of the Agreement, reimburse Whitaker and White for attorneys' fees and litigation expenses incurred in opposing the motion, and post a remedial notice. (CER 4-5.)

SUMMARY OF ARGUMENT

Applying its decisions in *D.R. Horton* and *Murphy Oil*, the Board reasonably held that the Company violated the NLRA by enforcing the Agreement through its motion to compel individual arbitration, and correctly found that its unfair-labor-

[3] The Board also adopted the judge's dismissal, as untimely, of the unfair labor practice charge alleging that the Company independently violated Sec. 8(a)(1) by requiring Whitaker and White to sign the Agreement. (CER 1, 16 n.4.) Thus, contrary to the Company's argument (Br. 24), the timeliness of that charge is not at issue. The Company never contended that the other unfair labor practice charges were untimely.

practice finding does not offend the Federal Arbitration Act (FAA)'s general mandate to enforce arbitration agreements according to their terms.

Section 7 of the NLRA protects employees' right to pursue work-related legal claims concertedly. Employers may not restrict that Section 7 right by applying facially neutral work rules in a manner that denies employees the right to join together to enforce their workplace rights. Employers also may not induce employees to waive that Section 7 right prospectively in individual agreements. Such restrictions or waivers violate Section 8(a)(1), which bars interference with Section 7 rights. The Company does not dispute this principle, but argues that its Agreement does not interfere with Section 7 rights because it lacks an express class waiver. The Company, however, has applied the Agreement to frustrate the efforts of its employees concertedly to enforce their rights and thus made manifest to its employees that it interprets the Agreement to waive their concerted activity rights and will compel their participation in individual arbitration. Accordingly, the Company's enforcement of a mandatory agreement to require individual arbitration violates the NLRA.

The Board also correctly found that the FAA does not mandate enforcement of the Agreement. Because the Company has interpreted and applied the Agreement to deny its employees their right to act in concert, the Company's enforcement of the Agreement violates the NLRA. For that reason, the

Agreement, as applied, is subject to the FAA's savings clause, which exempts from enforcement arbitration agreements subject to general contract defenses, including illegality. The Agreement, as enforced by the Company against its employees, violates the NLRA for reasons unrelated to arbitration and which have consistently been applied to other types of contracts. The Supreme Court's FAA jurisprudence does not compel a different result; the Court has never held that the FAA mandates enforcement of an arbitration agreement that directly violates another federal statute. Nor does the Company's right to petition shield its action, because the First Amendment does not protect motions that seek an illegal objective.

The Company also violated Section 8(a)(1) by maintaining an agreement that employees would reasonably read to restrict their Section 7 right to file charges with the Board. Employees would understand the Agreement's broad statement that all employment-related claims are subject to arbitration as prohibiting employees from filing charges with the Board. Evidence showing how the employees actually interpreted the rule is irrelevant; the issue is whether the rule chills Section 7 activity.

STANDARD OF REVIEW

The Board has the primary authority to interpret and apply the NLRA. *See Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953). Accordingly, the Board's reasonable interpretation of the NLRA is entitled

to affirmance. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that "the statutory text forecloses" agency's interpretation) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (Board "need not show that its construction is the *best* way to read the statute"); *Local Joint Executive Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008) (Board's decision is "accorded considerable deference as long as it is rational and consistent with the statute") (internal quotations omitted). Courts do not defer to the Board's interpretation of statutes other than the NLRA. *See United Food & Commercial Workers Intl. Union Local 400 v. NLRB*, 222 F.3d 1030, 1035 (D.C. Cir. 2000).

ARGUMENT

I. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY ENFORCING THE AGREEMENT SO AS TO BAR EMPLOYEES FROM CONCERTEDLY PURSUING WORK-RELATED CLAIMS

As noted (p. 6), in finding that the Company's enforcement of the Agreement violated Section 8(a)(1) of the NLRA, the Board relied upon *D.R. Horton* and *Murphy Oil*. In its brief to the Court, the Company, other than noting that those decisions were not enforced and that other courts have rejected their reasoning, raises no challenge to the Board's rationale. Specifically, the Company does not challenge the Board's conclusions that Section 7 protects the right of

employees to engage in concerted legal activity, that individual agreements restricting that right violate the NLRA, or that agreements unlawful under the NLRA are exempt from enforcement under the savings clause of the FAA. The Company has therefore waived any challenges to these findings. *See* Fed. R. App. P. 28(a)(8)(A); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) ("an issue … not discussed in the body of the opening brief is deemed waived," and cannot be raised for the first time in the reply brief).

As it did before the Board, the Company primarily contends that the Agreement does not interfere with employees' Section 7 rights because, unlike the agreements at issue in *D.R. Horton* and *Murphy Oil*, the Agreement does not expressly prohibit collective legal action. As discussed below, this argument ignores the effect of the Company's enforcement of the Agreement, which denied employees their Section 7 right to pursue their work-related claims collectively in all forums, judicial and arbitral—precisely the conduct that the Board found unlawful in *D.R. Horton* and *Murphy Oil*. Because the Board's findings in *D.R. Horton* and *Murphy Oil* provide the underpinning for why the Company's enforcement of the Agreement is unlawful, the basis for those decisions, and why they comport with both NLRA and FAA precedent, is set forth below. [4]

[4] Unlike the Company, the Chamber raises specific challenges to *D.R. Horton* and *Murphy Oil*'s rationale, which are addressed below. But because "an amicus curiae generally cannot raise new arguments on appeal, and arguments not raised

A. Section 7 of the NLRA Protects Concerted Legal Activity for Mutual Aid or Protection

Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other *mutual aid or protection*, and . . . to refrain from any or all of such activities." 29 U.S.C. § 157 (emphasis added). As explained below, courts have long upheld the Board's construction of Section 7 as protecting concerted pursuit of work-related legal claims, consistent with the language and purposes of the NLRA. That construction falls squarely within the Board's expertise and its responsibility for delineating federal labor law generally, and Section 7 in particular. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (noting that "the task of defining the scope of [Section] 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it'") (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)); *accord NLRB v. Calkins*, 187 F.3d 1080, 1089 (9th Cir. 1999) ("The Board has the

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by a party in an opening brief are waived," this Court can and should disregard the Chamber's arguments. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) (internal citations omitted). *See also Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 719 (9th Cir. 2003) ("In the absence of exceptional circumstances . . . [the court will] not address issues raised only in an amicus brief.").

responsibility in the first instance to delineate the precise boundaries of Section 7's mutual aid or protection clause").

Central to this case is the Board's holding that the right of employees to engage in concerted activity for mutual aid or protection – the "basic premise" upon which our national labor policy has been built, *Murphy Oil*, 2014 WL 5465454, at *1 – includes concerted *legal* activity. The reasonableness of the Board's view was confirmed by the Supreme Court in *Eastex*, 437 U.S. at 565-66 & n.15-16. In that case, the Court recognized that Section 7's broad guarantee reaches beyond immediate workplace disputes to encompass employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Id*. at 565-66 & n.15.

Indeed, as *Eastex* notes, for decades the Board has protected concerted legal activity. *Id*. at 565-66 & n.15. That line of cases dates back to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942), in which the Board found protected three employees' joint lawsuit filed under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq. It continues, unbroken and with court approval, through modern NLRA jurisprudence. *See, e.g.*, *Lewis v. Epic Sys. Corp.*, No. 15-2997, 2016 WL 3029464, at *2 (7th Cir. May 26, 2016) ("[F]iling a collective or class

action suit constitutes 'concerted activit[y]' under Section 7."); *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under [Section] 7 . . . ."); *Salt River Valley Water Users' Association v. NLRB*, 206 F.2d 325 (9th Cir. 1953) (concerted petition conferring power of attorney to recover wages due under the FLSA).[5]

Section 7's protection of legal activity for mutual aid or protection advances the objectives of the NLRA. The NLRA protects collective rights "not for their own sake but as an instrument of the national labor policy of minimizing industrial strife." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees' ability to resolve workplace disputes collectively in an adjudicatory forum effectively serves that purpose because collective lawsuits are an alternative to strikes and other disruptive protests. *D.R. Horton*, 357 NLRB at 2279-80. Conversely, denying employees access to concerted litigation "would only tend to frustrate the policy of the NLRA to protect the right of workers to act

[5] *Accord Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) ("Generally, filing by employees of a labor related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith."); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same); *Harco Trucking, LLC*, 344 NLRB 478, 478-79 (2005) (wage-related class action); *Le Madri Rest.*, 331 NLRB 269, 275 (2000) (concerted lawsuit alleging unlawful pay policies); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018, 1026 & n.26 (1980) (wage-related class action), *enforced*, 677 F.2d 421 (6th Cir. 1982).

together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

This Court's decision in *Salt River Valley* aptly illustrates how concerted legal activity functions as a safety valve when a labor dispute arises. 206 F.2d 326. In that case, unrest over the employer's wage policies prompted an employee to circulate a petition among co-workers designating him as their agent to seek back wages under the FLSA. Recognizing that concerted activity "is often an effective weapon for obtaining [benefits] to which [employees] . . . are already 'legally' entitled," this Court upheld the Board's holding that Section 7 protected the employees' effort to exert group pressure on the employer to redress their work-related claims through resort to legal processes. *Id*. at 328.

Protecting employees' concerted pursuit of legal claims also advances the congressional objective of "restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151; *accord Murphy Oil*, 2014 WL 5465454, at *1. Recognizing the strength in numbers, statutory employees have long exercised their Section 7 right to band together to take advantage of the evolving body of laws and procedures that legislatures have provided to redress their grievances. *See, e.g.*, *Eastex*, 437 U.S. at 565-66 & n.15; *Moss Planing Mill Co.*, 103 NLRB 414, 418 (1953) (concerted wage claim before administrative agency), *enforced*, 206 F.2d 557 (4th Cir. 1953). Such collective legal action seeks

to unite workers generally and to lay a foundation for more effective collective bargaining. *See Eastex*, 437 U.S. at 569-70. That result, in turn, furthers the NLRA's objective of enabling employees, through collective action, to increase their economic well-being. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753-54 (1985) (noting Congress' intention to remedy "widening gap between wages and profits") (quoting 79 Cong. Rec. 2371 (1935)).

As the Board has emphasized, what Section 7 protects in this context is the employees' right to act in concert "to *pursue* joint, class, or collective claims *if and as available*, without the interference of an employer-imposed restraint." *Murphy Oil*, 2014 WL 5465454, at *2 (second emphasis added). Accordingly, it is immaterial that Federal Rule of Civil Procedure 23, which governs class actions, does not "establish an entitlement to class proceedings for the vindication of statutory rights." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). The substantive entitlement at issue is the NLRA right of employees to pursue their legal rights concertedly. As the Board has explained, what the NLRA prohibits "is unilateral action, by an employer, that purports to completely deny employees access to class, collective, or group procedures that are otherwise available to them under statute or rule." *Murphy Oil*, 2014 WL 5465454, at *18.[6]

[6] The Chamber, raising two arguments the Company did not make to the Board or this Court, contends that class-action procedures were not available when the NLRA was enacted. (Amicus 14-15.) But joint and collective claims of various

In sum, the Board has reasonably construed Section 7 as guaranteeing employees the option of resorting to concerted pursuit of legal claims to advance work-related concerns. That construction is supported by longstanding Board and court precedent. It also reflects the Board's sound judgment that concerted legal activity is a particularly effective means to advance Congress's goal of avoiding labor strife and economic disruptions. And that judgment falls squarely within the Board's area of expertise and responsibility. *See City Disposal*, 465 U.S. at 829. *Accord Lewis*, 2016 WL 3029464, at *3 ("The Board's interpretation" that Section 7 protects concerted lawsuits "is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it.").

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forms long predate Rule 23, *Lewis*, 2016 WL 3029464, at *3, as do the Board's earliest decisions finding that Section 7 protects the collective legal pursuit of work-related claims. *See* pp. 13-14. Moreover, the NLRA was drafted to allow the Board to respond to new developments. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (recognizing Board's "responsibility to adapt the [NLRA] to changing patterns of industrial life"). The relevant point is that when class-action procedures became available, the NLRA barred employers from interfering with their employees' Section 7 right to use those new procedures for their mutual aid or protection. No more availing is the Chamber's assertion (Amicus 15), again not raised to the Board or by the Company, that Rule 23 is a "procedural device." It is the NLRA, not Rule 23, that creates the substantive right to engage in concerted legal action using whatever procedures courts or legislatures make available for the vindication of employment rights. *Eastex*, 437 U.S. at 566 (Section 7 protects right of employees to seek to "improve working conditions through resort to administrative and judicial forums").

B. The Company Violated Section 8(a)(1) of the NLRA by Enforcing the Agreement in a Way That Interferes With Employees' Section 7 Rights

An employer violates Section 8(a)(1) of the Act by maintaining a work rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights." *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 481 (1st Cir. 2011) (quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999)). A rule that explicitly restricts Section 7 conduct is invalid on its face. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). Otherwise, the rule will be found invalid if: "(1) employees would reasonably construe the language [of the rule] to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Ne. Land Servs.*, 645 F.3d at 482 (*quoting Lutheran Heritage*, 343 NLRB at 647) (alteration in *Ne. Land Servs.*). Because the Company imposed the Agreement on all employees as a condition of employment, which carries an "implicit threat" that failure to comply will result in loss of employment, the Board appropriately used its work-rule standard to find that the Company's actions in seeking to enforce the Agreement were unlawful. *D.R. Horton*, 357 NLRB at 2283; *see also NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d at 481-83 (applying to employment contract); *U-Haul Co.*, 347 NLRB 375, 377-78 (2006) (same), *enforced*, 255 F. App'x 527 (D.C. Cir. 2007).

The Company does not dispute, nor could it, that it sought to enforce the Agreement when it filed its motion to stay the employees' collective lawsuit and to compel individual arbitration. The employees' conduct that the Company's motion sought to prevent—asserting their right to engage in collective legal activity—is protected under Section 7 of the Act. Accordingly, the Board properly found (CER 3-5) that the Company's application of the Agreement to curb the employees' Section 7 rights rendered the Agreement unlawful under the third prong of *Lutheran Heritage*. 343 NLRB at 647 (rule unlawful if applied to restrict Section 7 rights). Under that prong, it is the rule's *application*, in and of itself, to protected conduct that establishes the rule's unlawfulness. It does not matter that the rule or policy does not explicitly restrict Section 7 activity; enforcement alone constitutes an unfair labor practice. *See Hitachi Capital America Corp.*, 361 NLRB No. 19, 2014 WL 3897175, at *3 (2014) (unnecessary to determine whether rule is facially overbroad when that rule was applied to restrict Section 7 activity).

1. The Company applied the Agreement to restrict employees' Section 7 activity

The Board properly found that by filing its motion to compel in district court, the Company "applied the [Agreement] in violation of 8(a)(1)." (CER 4.) In defending against the employees' lawsuit, the Company argued the employees were "compelled to arbitrate [their] claims on an individual basis, and [were] not permitted to arbitrate on a class or collective basis." (*Id.*) As the Board explained,

by making those arguments to the court, the Company "made clear their interpretation of [the Agreement]: arbitration is the exclusive forum for resolving employees' employment claims, and it must be conducted on an individual basis, not collectively." (*Id.*) Thus, through its motion, the Company attempted to simultaneously preclude collective action in the judicial forum (by moving to compel arbitration of the employees' collective claims) and the arbitral forum (by moving to compel *individual* arbitration).

The Company contends (Br. 32-33) that because the Agreement lacks an express waiver, it did not require the employees, as a condition of their employment, to waive their Section 7 rights to engage in collective legal activity and therefore does not run afoul of *D.R. Horton*. But the Company's argument misreads *D.R. Horton* and misunderstands the effect of its motion in district court, which effectively foreclosed all forums for collective legal action. As the Board explained, the Company's conduct "is precisely what the Board enjoined in *D.R. Horton*." (CER 4.) *See D.R. Horton*, 357 NLRB at 2288. ("[E]mployers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial.") The Company's contention that *D.R. Horton* does not apply because "employees could pursue their class claims in arbitration" (Br. 33) is directly contrary to how it viewed and attempted to apply the Agreement. Indeed, the Company made clear its view

regarding the Agreement's silence on whether or not the parties agreed to class or collective arbitration when it argued to the court that the "only fair reading of the Agreement is that the parties contemplated only *individual* arbitration." (CER 4; 456.) (Emphasis in original.) As the Board explained, "[t]his clearly constituted an argument that employees had waived their right to pursue class-wide claims—a waiver that the Company unlawfully imposed on them—and the basis for that argument was the [Agreement]." (CER 4.) And the Company continues to contend (Br. 36, 41) that the Agreement allowed only individual arbitration.

The Board therefore properly found that the Company "applied the Agreement in a manner that required employees to resolve all employment claims through individual arbitration, thereby compelling them to waive their Section 7 right to engage in collectively pursue litigation of their employment claims in *all* forums." (*Id*.) (Emphasis added.) By interpreting and applying the Agreement "to restrict activity protected by Section 7 of the Act," the Company lent an unlawful meaning to the Agreement, "render[ing it] unlawful." *Hitachi Capital America Corp.*, 2014 WL 3897175, at *4. *See also Albertson's, Inc.*, 351 NLRB 254, 258 (2007), *set aside*, 2014 WL 2929788 (June 27, 2014), *affirmed and incorporated by reference in* 362 NLRB No. 123 (June 18, 2015), *review pet. filed*, No. 15-71924 (9th Cir. June 24, 2015) (finding that confidentiality rule's "unlawful application . . . can be used to inform [its] meaning").

2. Individual agreements that prospectively waive employees' Section 7 rights violate Section 8(a)(1)

As the Board explained in *D.R. Horton*, 357 NLRB at 2280-81, and *Murphy Oil*, 2014 WL 5465454, at *1, 6, restrictions on Section 7 rights are unlawful even if they take the form of agreements between employers and employees. In *National Licorice Co. v. NLRB*, the Supreme Court held that individual contracts in which employees prospectively relinquish their right to present grievances "in any way except personally" or otherwise "stipulate[] for the renunciation … of rights guaranteed by the [NLRA]" are unenforceable, and are "a continuing means of thwarting the policy of the [NLRA]." 309 U.S. 350, 360-61 (1940). As the Court explained, "employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes." *Id*. at 364. Similarly, in *NLRB v. Stone*, the Seventh Circuit held that individual contracts requiring employees to adjust their grievances with their employer individually violate the NLRA, even when "entered into without coercion." 125 F.2d 752, 756 (7th Cir. 1942); *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (individual contracts conflicting with Board's function of preventing NLRA violations "obviously must yield or the [NLRA] would be reduced to a futility"). *Accord Lewis*, 2016 WL 3029464, at *2 ("Contracts that stipulate away employees' Section 7 rights or otherwise require actions unlawful under the NLRA are unenforceable.").

Applying that principle, the Board has found unlawful a variety of individual agreements under which employees or job applicants forfeit their Section 7 rights. *See, e.g.*, *First Legal Support Servs., LLC*, 342 NLRB 350, 362-63 (2004) (unlawful to have employees sign contracts stripping them of right to organize); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (unlawful to ask job applicant to agree not to join union); *Carlisle Lumber Co.*, 2 NLRB 248, 264-66 (1936) (unlawful to require agreement to "renounce any and all affiliation with any labor organization"), *enforced as modified*, 94 F.2d 138 (9th Cir. 1937). It has also regularly set aside settlement agreements that require such waivers as conditions of reinstatement. *See, e.g.*, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073, 1078 (2006) (employer unlawfully conditioned employees' reinstatement, after dismissal for non-union concerted protest, on agreement not to engage in further similar protests); *Bethany Med. Ctr.*, 328 NLRB 1094, 1105-06 (1999) (same); *cf. Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001) (employer unlawfully conditioned employee's severance payments on agreement not to help other employees in workplace disputes or act "contrary to the [employer's] interests in remaining union-free"), *enforced*, 354 F.3d 534 (6th Cir. 2004). And it has found unlawful agreements in which employees have prospectively waived their Section 7 right to access the Board's processes. *See, e.g.*, *McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (finding employer violated Section 8(a)(1) by

conditioning return to work from suspension on broad waiver of rights, both present and future, to invoke Board's processes for alleged unfair labor practices); *Reichhold Chems.*, 288 NLRB 69, 71 (1988) (explaining "in futuro waiver" of right to access Board's processes is contrary to NLRA). In sum, all individual contracts that waive Section 7 rights violate Section 8(a)(1) "no matter what the circumstances that justify their execution or what their terms." *J.I. Case*, 321 U.S. at 337.

The proposition that an employer may not lawfully induce an employee prospectively to waive her Section 7 rights flows from the unique characteristics of those rights and the practical circumstances of their exercise. Collective action does not occur in a vacuum, but results from employee interaction with others. *See NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105, 113 (1956) ("The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others"); *Harlan Fuel Co.*, 8 NLRB 25, 32 (1938) (rights guaranteed to employees by Section 7 include "full freedom to receive aid, advice and information from others concerning [their self-organization] rights"). The concerted activity of unorganized workers in particular often arises spontaneously when employees are presented with actual workplace problems and have to decide among themselves how to respond. *See, e.g.*, *Washington Aluminum Co.*, 370 U.S. at 14-15 (concerted activity spurred by

extreme cold in plant); *Salt River Valley*, 206 F.2d at 328 (concerted activity prompted by violations of minimum-wage laws).

As the Board has recognized, the decision whether collectively to walk out of a cold plant to join with other employees in a lawsuit over wages and hours is materially different from the decision of an individual employee – made in advance of any concrete grievance – to agree to refrain from *any* future concerted activity, regardless of the circumstances. *See Nijjar Realty, Inc.*, 363 NLRB No. 38, 2015 WL 7444737, at *5 (Nov. 20, 2015) (noting that such waivers are made "at a time when the employees are unlikely to have an awareness of employment issues that may now, or in the future, be best addressed by collective or class action"), *petition for review filed*, 9th Cir. No. 15-73921. When actual workplace issues arise, the NLRA "allows employees to engage in … concerted activity which they decide is appropriate." *Plastilite Corp.*, 153 NLRB 180, 183 (1965), *enforced in relevant part*, 375 F.2d 343 (8th Cir. 1967); *see also Serendippity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (same). In this context, prospective individual waivers, like the contract struck down in *National Licorice*, 309 U.S. at 361, impair the "full freedom" of the signatory employees to decide for themselves whether to participate in a particular concerted activity.[7] This principle is

[7] For similar reasons, the Board and the courts have held that Section 7 precludes enforcement of individual waivers of an employee's right to refrain from supporting a strike for its duration. *See NLRB v. Granite State Joint Board, Textile*

particularly applicable here, where the employees became aware of the Company's claim that they had prospectively waived their Section 7 rights only when the Company took action against them by filing a motion to compel individual arbitration.

The fact that Section 7 also protects employees' "right to refrain" from concerted activity does not change that calculus. Similar to the choice to engage in concerted activity, the right to refrain belongs to the employee to exercise, free from employer interference, in the context of a specific workplace dispute. As the Board has explained, employees remain free to refrain by choosing not to participate in a specific concerted legal action. *See Murphy Oil*, 2014 WL 5465454, at *24 ("In prohibiting *employers* from requiring employees to pursue their workplace claims individually, *D.R. Horton* does not compel *employees* to pursue their claims concertedly."). Moreover, it is difficult to see how the

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Workers Local 1029, 409 U.S. 213, 217 (1972) (protecting right of employee to "change his mind" regarding whether to participate in concerted activity based on "[e]vents occurring after" initial decision whether to do so). In *Granite State*, the Court upheld the Board's position that Section 7 preserves the option of an employee who has resigned from a union to decide not to honor a strike he once promised to support, and that a rule preventing him from doing so was unlawful. *Id.* at 214-17. Just as "the vitality of § 7 requires that the [employee] be free to refrain in November from the actions he endorsed in May," *id.* at 217-18, an employee must be able to decide whether to engage in concerted activity when the opportunity for such activity arises, even after previously deciding not to do so when circumstances were different. *See also Mission Valley Ford Truck Sales*, 295 NLRB 889, 892 (1989) (employer could not hold employee to "earlier unconditional promises to refrain from organizational activity").

employees here could be said to have knowingly exercised the right to refrain from Section 7 activity by signing an ambiguous agreement that only later was applied by their employer to restrict their choice to engage in concerted activity.

Prospective waivers of Section 7 rights are unlawful not only because they impair the rights of employees who are party to them but also because they preemptively deprive non-signatory employees of the signatory employees' mutual aid and support at the time that an actual dispute arises. That impairment occurs because, as discussed above, the Section 7 right to engage in concerted activity depends on the employee's ability to communicate with and appeal to fellow employees to join in such action. *See, e.g.*, *Signature Flight Support*, 333 NLRB 1250, 1260 (2001) (finding employee efforts "to persuade other employees to engage in concerted activities" protected), *enforced mem.*, 31 F. App'x 931 (11th Cir. 2002); *Am. Fed'n of Gov't Emps.*, 278 NLRB 378, 382 (1986) (describing as "indisputable" that one employee "had a Section 7 right to appeal to [another employee] to join" in protected activity); *Harlan Fuel Co.*, 8 NLRB 25, 32 (1938) (discussing employees' Section 7 right "to receive aid, advice, and information from others"). That right includes appeals to employees of other employers as well as to co-workers. *See Eastex*, 437 U.S. at 564-65. Prospective waivers of the right to engage in concerted activity deprive non-signatory employees of any meaningful opportunity to enlist signatory employees in their cause.

Further, where, as here, the prospective waiver of Section 7 rights operates to bar only concerted *legal* activity, the result is to limit the employees' options to comparatively more disruptive forms of concerted activity at a time when workplace tensions are high and employees are deciding which, if any, concerted response to pursue. As the Board has explained, *D.R. Horton*, 357 NLRB at 2279-80, the peaceful resolution of labor disputes is a core objective of the NLRA, and that objective is ill-served by individual arbitration agreements that prospectively waive the right of employees to consider the option of concerted legal action along with other collective means of advancing their interests as employees.

Finally, for the first time in its brief to this Court, the Company contends (Br. 34-35) that its attempted enforcement of the Agreement does not violate Section 8(a)(1) because, despite its burdening their efforts, Whitaker and White successfully launched a collective lawsuit and ultimately secured a class-wide settlement. That argument must be rejected. At the outset, because the Company failed to raise the settlement to the Board, the Court lacks jurisdiction to consider this argument. See 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing*, 456 U.S. 647, 665 (1982) (Section 10(e) precludes parties from raising claims not raised to the Board). Although the settlement occurred

before the Board's Order, the Company failed to seek to reopen the record or request that the Board take judicial notice of it. Indeed, the Board stated that the issue of whether the employees could proceed collectively "has yet to be determined by an arbitrator or other authority."[8] (CER 3.)

In any event, the actual filing of the collective lawsuit and the class-wide settlement does nothing to lessen or negate the coercive effect of Company's attempt to enforce the Agreement. The actual practice of employees does not determine the legality of the Agreement, and "'evidence of employee interpretation consistent with its own'" is unnecessary for the Board to find the Agreement unlawful. *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014) (quoting *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007)). The Board has found that unlawful work rules are "likely to have a chilling effect on Section 7 rights" regardless of whether those rules have actually stopped any employees from recognizing those rights. *See Lafayette Park Hotel*, 326 NLRB at 825. Therefore, contrary to the Company's contention (Br. 33), it does not matter that the judge did not rule on whether arbitration would be solely individual; the Company's motion chilled employees' Section 7 rights regardless of whether it produced an immediate ruling. The Board reasonably found that the Company's

[8] Contemporaneously with this brief, the Board is filing a motion opposing the Company's request (Br. 15 n.29) that the Court take judicial notice of the class-wide settlement.

attempt to interfere with Whitaker's and White's Section 7 activity violated Section 8(a)(1), regardless of that attempt's ultimate success.

In sum, the Company's application of the Agreement so as to bar a key form of concerted activity violates Section 8(a)(1) of the NLRA. And it is no less unlawful for being based on an agreement, in light of the longstanding prohibition on individual contracts that prospectively waive Section 7 rights. That the Company used the particular vehicle of an arbitration agreement subject to the FAA to bar employees' Section 7 rights likewise does not excuse its restriction of those rights; the Company cannot "attempt 'to achieve through arbitration what Congress has expressly forbidden'" under the NLRA. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 676 (4th Cir. 2016) (quoting *Graham Oil v. ARCO Prods. Co.*, 43 F. 3d 1244, 1249 (9th Cir. 1994)). As explained more fully in part C below, such agreements thus are not entitled to enforcement under the FAA.

C. The FAA Does Not Mandate Enforcement of Arbitration Agreements That Violate the NLRA by Prospectively Waiving Section 7 Rights

The FAA does not preclude enforcement of the Board's Order, and any contention otherwise should be rejected on the ground that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1972). *Accord POM Wonderful LLC v. Coca-Cola*

Co., 134 S. Ct. 2228, 2236 (2014). As demonstrated below, because agreements unlawful under the NLRA are exempted from enforcement by the FAA's savings clause, there is no difficulty in fully enforcing each statute according to its terms.[9]

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save* upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). That enforcement mandate, with its express savings-clause exception, "reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). "[C]ourts must [therefore] place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id.* (internal quotations omitted).

Under those core FAA principles, attempts to enforce arbitration agreements in a manner that violates the NLRA by barring protected, concerted litigation fit within the savings-clause exception to enforcement. The Board's holding to that effect in *D.R. Horton* and *Murphy Oil*, applied here, implements both the NLRA and the FAA and is consistent with Supreme Court precedent interpreting both statutes.

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[9] As noted above (pp. 10-11 n.4), the Chamber, not the Company, directly challenges the Board's application of the savings clause to exempt the Agreement from enforcement.

1. Because an employee cannot prospectively waive Section 7 rights in any contract, the Agreement fits within the FAA's savings-clause exception to enforcement

The FAA's savings clause expressly limits the FAA's command to enforce arbitration agreements as written and, consequently, limits the broad federal policy favoring arbitration. Under the savings clause, general defenses that would serve to nullify any contract also bar enforcement of arbitration agreements. Conversely, defenses that affect only arbitration agreements conflict with the FAA, as do ostensibly general defenses "that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. 339.

One well-established general contract defense is illegality. As the Supreme Court explained in *Kaiser Steel Corp. v. Mullins*, "a federal court has a duty to determine whether a contract violates federal law before enforcing it." 455 U.S. 72, 83-84 (1982). Giving effect to that principle, the Court held that if a contract required an employer to cease doing business with another company in violation of the NLRA, it would be unenforceable. *Id*. at 84-86; *see also Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 276 n.6 (1st Cir. 1983) (explaining that "federal courts may not enforce a contractual provision that violates section 8 of the [NLRA]").

As described above (pp. 23-24), the Board, with court approval, has consistently rejected, as unlawful under the NLRA, a variety of individual

contracts that are unrelated to arbitration because they restrict Section 7 rights. *Nat'l Licorice*, 309 U.S. at 360-61, 364. It has set aside settlement agreements that require employees to refrain from concerted protests, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB at 1078; *Bethany Med. Ctr.*, 328 NLRB at 1105-06, and has found unlawful a separation agreement that was conditioned on the departing employee's agreement not to help other employees in workplace disputes, *Ishikawa Gasket Am.*, 337 NLRB at 175-76. The Board has also found waivers of an employee's right to engage in concerted legal action are unlawful in contracts that do not provide for arbitration. *See Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753, at *1 & n.3 (Nov. 30, 2015), *petition for review filed*, 5th Cir. No. 15-60860; *Logisticare Solutions, Inc.*, 363 NLRB No. 85, 2015 WL 9460027, at *1 (Dec. 24, 2015), *petition for review filed*, 5th Cir. No. 15-60029. That unbroken line of precedent, dating from shortly after the NLRA's enactment, demonstrates that illegality under the NLRA has consistently served to invalidate a variety of contracts, not just arbitration agreements, and does not derive its meaning from arbitration.

Moreover, unlike the courts, whose hostility to arbitration prompted enactment of the FAA, *see Concepcion*, 563 U.S. at 339, the Board harbors no prejudice against arbitration. *See Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964) (discussing Board's policies favoring arbitration as means of

peacefully resolving workplace disputes). Nothing in the Board's *Horton* decision prohibits an employer from requiring arbitration of all *individual* work-related claims; as the Board explained, "[e]mployers remain free to insist that *arbitral* proceedings be conducted on an individual basis." *D.R. Horton*, 357 NLRB at 2288. What violates the NLRA is enforcing an agreement to foreclose the concerted pursuit of work-related claims in any forum, arbitral or judicial. (CER 3.) Such action unlawfully restricts employees' Section 7 right to join with others in seeking to enforce their employment rights. *D.R. Horton*, 357 NLRB at 2278-80.

For this reason, the Company is incorrect in arguing (Br. 35-36) that the Board's decision runs afoul of the principle that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 684-87 (2010). This argument fails to recognize that nothing in the Board's Order requires the Company to submit to class arbitration. Furthermore, the Company's argument ignores that the Board, consistent with the principles discussed above, expressly stated that the Company was "free to insist" that employees arbitrate their individual claims and that arbitral proceedings be conducted on an individual basis. (CER 4, *quoting D.R. Horton*, 357 NLRB at 2288.) What the Company was not free to do was to apply the Agreement in a

manner that required employees to waive their right to maintain employment-related collective actions in all forums, whether arbitral or judicial.

Consistent with the Board's analysis in *D.R. Horton* and *Murphy Oil*, the Seventh Circuit recently held that arbitration agreements that waive employees' Section 7-protected right to engage in concerted action in violation of Section 8(a)(1) "meet[] the criteria of the FAA's savings clause for nonenforcement." *Lewis*, 2016 WL 3029464, at *6. In coming to that conclusion, the court agreed with the Board that contracts restricting Section 7 activity are illegal. *Id.* at *3, *10. It also noted that, rather than embodying hostility, the NLRA "does not disfavor arbitration" as a mechanism of dispute resolution. *Id*. at *7. Because the arbitration agreement at issue "ran up against the substantive right to act collectively that the NLRA gives to employees," the court refused to enforce the agreement. *Id.*

In sum, because the defense that a contract is illegal under the NLRA is unrelated to the fact that an agreement to arbitrate is at issue, that defense falls comfortably within the FAA's savings-clause exception. In other words, the Board's finding that the Company violated the NLRA by enforcing the Agreement in a manner that would require arbitration of all work-related claims on an individual basis adheres to the FAA policy of enforcing arbitration agreements on

the same terms as other contracts.[10] There is no conflict between either the express statutory requirements, or animating policy considerations, of the FAA and NLRA with respect to that unfair-labor-practice.[11]

2. The Board's *D.R. Horton* and *Murphy Oil* Decisions Are Consistent with the Supreme Court's FAA Jurisprudence

The Company is mistaken in its contention (Br. 30-31, 36, 44) that the Board's position is foreclosed by Supreme Court precedent enforcing agreements that require individual arbitration in other contexts. The Supreme Court has never

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[10] Because Section 7 is only implicated when the agreement applies to work-related claims of statutory employees, it poses no impediment to enforcement of arbitration agreements that apply to consumer, commercial, or other non-employment-related claims, or that involve employees exempt from NLRA coverage, such as statutory supervisors or managers. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (age-discrimination claim by manager); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012) (consumer claims under Credit Repair Organization Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989) (investor claims under Securities Act).

[11] For that reason, it is unnecessary to reach the question (Br. 44-45, Amicus 17-20) of whether the NLRA clearly contains a "contrary congressional command" overruling the FAA. That inquiry is designed to determine which statutory imperative controls when another federal statute conflicts with the FAA and the two cannot be reconciled. Here, there is no conflict between the statutes; both can—and should—be given effect. *Morton*, 417 U.S. at 551; *accord Lewis*, 2016 WL 3029464, at *6 (finding "no conflict between the NLRA and the FAA, let alone an irreconcilable one"). Nevertheless, it is evident that Section 8(a)(1) of the NLRA expressly commands employers not to interfere with their employees' Section 7 right to engage in concerted activity for mutual aid or protection. To the extent an arbitration agreement bars concerted pursuit of claims in any forum, whether arbitral or judicial, its enforcement under the FAA would "inherent[ly] conflict" with those NLRA provisions. *Gilmer*, 500 U.S. at 26.

considered whether agreements requiring individual arbitration of all collective claims must be enforced under the FAA despite the NLRA's protection of the right of statutory employees to pursue work-related claims concertedly. Nor has the Court found enforceable an arbitration agreement that violates a federal statute – as the Company's attempt to enforce the Agreement violates Section 8(a)(1). Finding that a contract illegal under the NLRA is exempt from enforcement under the FAA's savings clause gives effect to the settled principle that courts should regard two co-equal statutes as effective. *Morton*, 417 U.S. at 551.

None of the Supreme Court FAA cases that the Company cites (Br. 36) involve arbitration agreements that impair core provisions of another federal statute, much less directly violate such a statute. Instead, the Court has enforced arbitration agreements over challenges based on statutory provisions only where the agreements were consistent with the animating purposes of those particular statutes. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, which involved a challenge to arbitration of claims under the Age Discrimination in Employment Act ("ADEA"), the Court determined that Congress' purpose in enacting the ADEA was "to prohibit arbitrary age discrimination in employment." 500 U.S. 20, 27 (1991). Because the substantive rights of individual employees to be free of age-based discrimination could be adequately vindicated in individual arbitration, the Court held that an arbitration agreement could be enforced. The Court took

note of the ADEA provisions affording a judicial-forum and optional collective-action procedures, but did not find those provisions to be central to the ADEA's purpose, stating that Congress did not "'intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum.'" *Id.* at 29 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).[12]

Unlike the statutory provisions at issue in the Supreme Court's FAA cases – where protecting collective action against individual employee waiver is not an objective of the statutes – the NLRA's provisions protecting collective action are foundational, underlying the entire architecture of federal labor law and policy. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (characterizing Section 7 rights as "fundamental"). Under the mode of statutory analysis used in cases like *Gilmer*, that is a crucial distinction. As the Board explained in *Murphy Oil*, "The core objective of the [NLRA] is the protection of workers' ability to act

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[12] The Supreme Court has consistently maintained that same analytical focus on statutory purpose when assessing challenges to the enforcement of arbitration agreements based on provisions in other federal statutes. *See, e.g.*, *CompuCredit*, 132 S. Ct. at 671 (judicial-forum provision not "principal substantive provision[]" of Credit Repair Organizations Act); *Rodriguez de Quijas*, 490 U.S. at 481 (judicial-forum and venue provisions in Securities Act not "so critical that they cannot be waived"); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 235-36 (1987) (Exchange Act provision not intended to bar regulation when "chief aim" was to preserve exchanges' power to self-regulate); *accord Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (jury trial right under FLSA is not substantive and therefore can be waived).

in concert, in support of one another." 2014 WL 5465454, at *1; *see also Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (describing NLRA as "designed to … encourag[e] employees to promote their interests *collectively*").[13]

The structure of the NLRA further demonstrates that fundamental nature. As the Seventh Circuit has stated, "Every other provision of the statute serves to enforce the rights Section 7 protects." *Lewis*, 2016 WL 3029464, at *9. In Section 8, Congress prohibited restriction of Section 7 rights. 29 U.S.C. § 158(a)(1), (b)(1). Section 9 establishes procedures, such as elections and exclusive representation, to implement representational Section 7 rights. 29 U.S.C. § 159. And Section 10 empowers the Board to prevent violations of Section 8. 29 U.S.C. § 160. Thus, the NLRA's various provisions all lead back to Section 7's guarantee of employees' right to join together "to improve terms and

[13] In nonetheless insisting that *Gilmer*, together with *Stolt-Nielsen*, compels construing the Agreement to limit employees to individual arbitration of their statutory employment claims, the Company (Br.32, 36) fails to acknowledge that in neither case was the Supreme Court attempting to harmonize the FAA with the core objectives of the NLRA—a statute that the Supreme Court has construed to protect the collective litigation rights of employees and to bar individual agreements prospectively waiving Section 7 rights. *See Eastex*, 437 U.S. at 565-66; *National Licorice*, 309 U.S. at 360-61.

conditions of employment or otherwise improve their lot as employees." *Eastex*, 437 U.S. at 565.[14]

The right to engage in collective action for mutual protection is not only critical to the NLRA, but also a "basic premise" of national labor policy generally. *Murphy Oil*, 2014 WL 5465454, at *1. For example, in the Norris-LaGuardia Act, enacted three years before the NLRA, Congress declared unenforceable "[a]ny undertaking or promise" in conflict with the federal policy of protecting employees' freedom to act concertedly for mutual aid or protection. 29 U.S.C. § 102, 103. Congress also barred judicial restraint of concerted litigation "involving or growing out of any labor dispute" based on employer-employee agreements. 29 U.S.C. § 104.

Unlike in the cases cited by the Company (Br. 36), concerted activity under the NLRA is not merely a procedural means of vindicating a statutory right; it is

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[14] The Board's determination that Section 7 is critical to the NLRA is entitled to considerable deference. *See City Disposal*, 465 U.S. at 829 (Board has prerogative to define Section 7); *Garner*, 346 U.S. at 490 (Board has primary authority to interpret and apply NLRA); *see also City of Arlington v. FCC*, 133 S. Ct. at 1871 (statutory interpretation within agency's expertise should be accepted unless "foreclose[d]" by the statutory text); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. at 842-43; *see generally* Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV. L .REV. 907, 919 (2015) (explaining that "[t]h[e] [FAA] context does not alter the conclusion that … the NLRB's determination is an interpretation of the statute the agency administers and is thus within *Chevron*'s scope"). For this reason, the Company is incorrect when it argues (Br. 18) that the Court should review the Board's decision *de novo* because the Board acted outside its expertise.

itself a core, substantive statutory right. And Congress expressly protected that right from employer interference in Section 8(a)(1). Therefore, an arbitration agreement that an employer enforces so as to preclude employees covered by the NLRA from engaging in concerted legal action in any forum is not like a waiver of the optional collective-action mechanisms in statutes like the ADEA or FLSA. The Supreme Court has never held that an arbitration agreement may waive such rights or violate the statutes that create and protect them. *See Lewis*, 2016 WL 3029464, at *9 (observing that "[c]ourts routinely invalidate arbitration provisions that interfere with substantive statutory rights").

The Company's (Br. 36) and the Chamber's (Amicus 6, 9-10) reliance on *Concepcion* is flawed for similar reasons. Unlike the Agreement, the arbitration agreement in that case did not directly violate a co-equal federal law. In *Concepcion*, the rule that assertedly precluded enforcement of the agreement under the FAA's savings clause was a judicial interpretation of state unconscionability principles. It was intended to ensure prosecution of low-value claims arising under other statutes by enabling consumers to bring them collectively. 563 U.S. at 340.[15] That interpretation barred class-action waivers in most arbitration agreements in

[15] Similarly, in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court applied *Concepcion* to strike down a federal-court-imposed requirement that collective litigation must be available when individual arbitration would be prohibitively expensive, ensuring an "affordable procedural path" to vindicate claims. 133 S. Ct. 2304, 2308-09 (2013).

consumer contracts of adhesion. Employing a preemption analysis, the Court found that the rule "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." *Id.* at 344, 346-52. It found, moreover, that the unconscionability law was "applied in a fashion that disfavors arbitration." *Id*. at 341.

By contrast, the Board's rule fits within the savings clause because it bars enforcement of arbitration agreements that violate Section 8(a)(1) of the NLRA, a specific federal statutory proscription. The Board's rule is intended to effectuate the NLRA, not to implement non-statutory policies such as the judicially-created policy of facilitating particular claims, low-value or otherwise, brought under other laws. *Cf. Concepcion*, 563 U.S. at 340; *Italian Colors*, 133 S. Ct. 2312 & n.5. That the Supreme Court declined to read the savings clause as protecting such judicially-created defenses, which "stand as an obstacle to the accomplishment of the FAA's objectives," *Concepcion*, 563 U.S. at 343, does not suggest that the savings clause does not encompass a defense of contract illegality based on the core statutory policies of the NLRA, a co-equal federal law. To the contrary, reading the savings clause so narrowly as to exclude the defense of illegality under Section 7 "would render the FAA's saving clause a nullity." *Lewis*, 2016 WL 3029464, at *8.

Unlike the court decisions criticized in *Concepcion* and *Italian Colors*, the Board has not taken aim at arbitration. Rather, it has applied a longstanding NLRA interpretation, endorsed by the Supreme Court, to find unlawful *all* individual contracts, including arbitration agreements, that employers attempt to use to waive Section 7 rights in violation of Section 8(a)(1). That illegality defense developed outside of the arbitration context and was recognized by the Board and courts well before the advent of agreements mandating individual arbitration of employment disputes.[16] Moreover, the Board has not applied the statutory ban on restrictions of Section 7 rights in a manner disproportionately impacting arbitration agreements. *Cf. Concepcion*, 563 U.S. at 342; *see also id*. at 343 ("it is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts"). Indeed, unlike California courts, the Board has never required that an employer allow employees the opportunity to arbitrate as a class. Rather, as noted above, the Board acknowledges an employer's right "to insist that *arbitral* proceedings be conducted on an individual basis," so long as employees remain free to bring concerted actions in another forum.[17] *D.R. Horton*,

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[16] It was not until 2001 that the Supreme Court definitively ruled that the FAA applied to employment contracts. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

[17] There is, accordingly, no basis for the Chamber to opine (Amicus 27) that "conditioning the enforcement of arbitration provisions on the availability of class procedures" would cause employers to "abandon arbitration altogether—to the detriment of employees, businesses, and the economy as a whole."

357 NLRB at 2288. And, rather than being hostile to arbitration as a means of enforcing statutory rights of employees, the Board embraces arbitration as "a central pillar of Federal labor relations policy, and in many different contexts … defers to the arbitration process." *Id*. at 2289 (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 578 (1960)).

The Company thus overreads the Supreme Court's FAA cases as dispositive of the issue here, and as standing for the broad proposition that the FAA demands enforcement of arbitration agreements that violate a co-equal federal statute. *See Alexander v. Sandoval*, 532 U.S. 275, 282-84 (2001) (instructing parties not to treat

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To the extent the Chamber maintains (*id*. at 28-31) that arbitration is a better means of resolving workplace disputes for both employers and employees, its view of the employees' best interests should be discounted. *Cf. Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (explaining Board is "entitled to suspicion" concerning employer's "benevolence as its workers' champion"). In any event, nothing in the Board's rule precludes employees from making that decision for themselves at the time a claim or grievance arises and collective litigation is a real option. In that context, Section 7 gives employees the right to decide whether to pursue individual arbitration or to forego that advantage in order to benefit other employees or to strengthen the cause of employees generally. *See, e.g., United Servs. Auto Ass'n*, 340 NLRB 784, 792 (2003) (employee opposed employer policy "solely for the benefit of her fellow employees" when she would not personally be affected), *enforced*, 387 F.3d 908 (D.C. Cir. 2004); *Caval Tool Div.*, 331 NLRB 858, 862-63 (2000) ("[A]n employee who espouses the cause of another employee is engaged in concerted activity, protected by Section 7…."), *enforced*, 262 F.3d 184 (2d Cir. 2001); *accord NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942) (worker solidarity established by employees aiding an aggrieved individual who has the only "immediate stake in the outcome" enlarges the power of employees to secure redress for their grievances and "is 'mutual aid' in the most literal sense").

Supreme Court decisions as authoritative on issues of law Court did not decide). The Fifth Circuit made a similar error in rejecting the Board's rationale in *D.R. Horton*.[18] That court cited prior FAA cases like *Gilmer* for the proposition that "there is no substantive right to class procedures under the [ADEA]" or "to proceed collectively under the FLSA." 737 F.3d at 357. But those cases do not answer the materially different question of whether the NLRA protects such a right. And the Fifth Circuit's savings-clause analysis relied solely on *Concepcion*, *id.* at 358-60, while failing to recognize the material differences between the Board's application of longstanding NLRA principles and the judge-made California rule in that case. The Seventh Circuit, by contrast, has held that *Concepcion* does not govern because, unlike the rule in that case, the Board's

[18] Likewise, other circuits' decisions that the Company (Br. 30, n.37) relies upon as rejecting the Board's *D.R. Horton* position in non-Board cases overread Supreme Court precedent and reflect a misunderstanding of the Board's position. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (finding *Concepcion* resolved savings-clause issue, and FLSA did not contain congressional command barring enforcement of arbitration agreement); *Sutherland v. Ernst &Young LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam) (rejecting citation to Board's *D.R. Horton* decision based on *Owen*, without analysis). The Eighth Circuit's decision in *Cellular Sales of Missouri, LLC v. NLRB*, relies on *Owen* to reject *Horton* in a Board case, but added no new rationale. *See Cellular Sales of Missouri, LLC v. NLRB*, No. 15-1620, 2016 WL 3093363, at *2 (8th Cir. June 2, 2016). None of those decisions address the Board's savings clause argument. District court and state court decisions rejecting the Board's position suffer from the same analytical flaws. Indeed, as the Seventh Circuit noted, the Fifth Circuit is the only circuit to "engag[e] substantively with the relevant arguments." *Lewis*, 2016 WL 3029464, at *8.

"general principle" barring the prospective waiver of Section 7 activity "extends far beyond collective litigation or arbitration" and is not hostile to the arbitral process. *Lewis*, 2016 WL 3029464, at *7.

The Company (Br. 30 n. 37) also overreads this Court's decision in *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013), by citing it as an example of a decision where a court "outright rejected" the Board's holding in *D.R. Horton*. In that case, this Court held that the plaintiff had waived her argument that the arbitration agreement was unenforceable based on the Board's *D.R. Horton* rationale, and then "[w]ithout deciding the issue" cited conflicting decisions both rejecting and applying that rationale. *Id.* at 1075 & n.3. Accordingly, by its own terms, *Richards* did not pass on the validity of the Board's *D.R. Horton* analysis.

In sum, because a different right is at stake when a statutory employee asserts his Section 7 rights than in any of the Supreme Court cases that have enforced agreements requiring individual arbitration, a different result is warranted. Even in cases brought to vindicate individual workplace rights under other statutes, employees covered by the NLRA carry into court not only those individual rights but also the separate Section 7 right to act concertedly. Those employees thus may properly be entitled to more relief than plaintiffs who either do not enjoy or fail to assert that additional right.

Employer attempts to interfere with their employees' right to bring concerted legal action violate the NLRA even if they do not offend the ADEA or other statutes granting individual rights. Just because an employer's action is not prohibited by one statute "does not mean that [it] is immune from attack on other statutory grounds in an appropriate case." *Emporium Capwell*, 420 U.S. at 71-72; *see also New York Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) ("[T]here is no anomaly if conduct privileged under one statute is nonetheless condemned by another; we expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose."). The NLRA's protection of, and prohibition on interference with, concerted activity is what distinguishes it from other employment statutes and what renders employer attempts to require *individual* arbitration unlawful under the NLRA and unenforceable under the FAA.

D. The Company's Enforcement of the Agreement Is Not Protected Petitioning under the First Amendment

The Board's finding that the Company violated the NLRA by seeking enforcement of its Agreement does not, contrary to the Company's assertion (Br. 39-46), deprive the Company of its First Amendment right to petition. The Supreme Court has explained that, although the First Amendment's protection of the right to petition the Government for redress of grievances includes the right of access to the courts, it does not protect petitioning that "has an objective that is

illegal under federal law." *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 737 n.5 (1983). Under that exception, court action constitutes an unfair labor practice if "[o]n the surface" it "seek[s] objectives which [are] illegal under federal law." *Teamsters Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992); *see also Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1166-67 (8th Cir. 2000) (holding Board could enjoin employer's discovery request seeking union-authorization cards in state-court misrepresentation suit, for request interfered with employees' rights to organize under NLRA and thus had illegal objective). That is true regardless of the merits of the underlying lawsuit. *See Teamsters Local 776*, 973 F.2d at 236.[19]

Consequently, under settled law, the Board may restrain litigation that has the objective of enforcing an illegal contract, even if the suit is otherwise meritorious. *Id.*; *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003); *see also Murphy Oil*, 2014 WL 5465454, at *27-28 (and cases cited therein). Because the Company unlawfully applied the Agreement by commencing litigation seeking to stay a protected, concerted lawsuit and to compel individual arbitration, the Board reasonably found (CER 3-5) that the Company's efforts had an illegal objective and thus fell outside the protection of the First Amendment.

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[19] In the absence of an illegal objective, the Board may find a lawsuit unlawful only if it is both objectively baseless *and* subjectively motivated by an unlawful purpose. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002). Although the Company argues (Br. 41-42) that its efforts to enforce the Agreement in the Superior Court did not meet that standard, the Board never reached the issue, having found an illegal objective.

See Manno Elec., Inc., 321 NLRB 278, 296-97 (1996) (halting employer lawsuit alleging that employees violated state law by engaging in Section 7-protected conduct), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997). The Agreement's facial validity does not undercut the Board's finding that the Company's motion to compel had an illegal objective because, as the Board explained, "the [Company] sought a construction of the [A]greement that was plainly unlawful under the Board's decisions in *D.R. Horton* and *Murphy Oil*." (CER 5.) This Court has previously recognized that a lawsuit has an illegal objective if it "would directly undercut" a Board order. *Small v. Operative Plasterers' & Cement Masons' Int'l Assoc.*, 611 F.3d 483, 493 (9th Cir. 2010). The Company's lawsuit—which seeks to enforce an agreement so as to require employees to forgo collective action in any forum—does just that.

The Company contends that the Board has taken *Bill Johnson's* "out of context." (Br. 42.) Specifically, the Company claims that its motion to compel does not lose First Amendment protection under *Bill Johnson's* because it is not a state law claim preempted by the NLRA. (Br. 42-44.) But the Company misreads *Bill Johnson's* and the Board's decision. In *Bill Johnson's*, the Court enumerated two separate exceptions to the right to petition: both "a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption" and "a suit that has an objective that is illegal under federal law." *Bill Johnson's*, 461

U.S. at 737 n.5. The Board's decision rests on the second exception, not the first, and discusses only the Company's illegal objective, not any alternative preemption rationale. (CER 5.) While the Company discusses at length (Br. 42-46) why its motion is not preempted by the Act, it does not challenge the Board's finding that the lawsuit had an illegal objective of applying an arbitration agreement to restrict employees' Section 7 rights.

II. THE COMPANY VIOLATED SECTION 8(a)(1) BY MAINTAINING AN AGREEMENT EMPLOYEES WOULD REASONABLY UNDERSTAND AS RESTRICTING THEIR RIGHT TO FILE CHARGES WITH THE BOARD

A. The Employees Reasonably Read the Agreement To Restrict Filing Charges

Employees have an unquestionable Section 7 right to file and pursue charges before the Board. *See Util. Vault Co.*, 345 NLRB 79, 82 (2005). Any workplace rule that either explicitly restricts that right, or that employees would "reasonably construe" as doing so, is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646; *accord Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208-09 (5th Cir. 2014). The Board properly found that employees would reasonably read the Agreement to restrict their right to file charges with the Board.

The Agreement tells employees that "all claims or controversies arising out of, relating to or associated with the Employee's employment" are subject to mandatory arbitration as the "exclusive remedy." (CER 1 n. 1, 2; 63, 65.) The

Agreement gives a long list of claims it covers, "including, but not limited to […] claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy." (CER 14; 63, 65.) "[B]ased on the breadth of the [Agreement's] language encompassing claims under Federal statutes and regulations" of the Agreement, the Board reasonably concluded that the employees would construe the Agreement as disallowing employees from filing charges with the Board. (CER 2.) *See, e.g.*, *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enforced*, 255 F. App'x. 527 (D.C. Cir. 2007) (finding unlawful arbitration agreement that applied to all "disputes, claims or controversies that a court of law would be authorized to entertain").

The Company contends (Br. 25-26) that the Board's decision is not supported by substantial evidence because the employees in this case presumably did not read the Agreement to prohibit them from filing Board charges, and the Company did nothing to enforce the policy against employees filing Board charges. That argument misunderstands the *Lutheran Heritage* test, which requires only a finding that a reasonable employee would understand the Agreement as prohibiting filing charges with the Board. 343 NLRB at 646. The Board, in making this finding, "focuses on the text" of the challenged rule and does not consider how "employees have . . . construed the rule." *Cintas Corp.*, 482 F.3d at 467 (stating that so long as Board's "textual analysis is reasonably defensible and

adequately explained," Board "need not rely on evidence of employee interpretation consistent with its own to determine that a company rule violates . . . the [NLRA]"). Thus, contrary to the Company, the Agreement is not lawful simply because it did not stop employees from filing charges. Rather, the relevant question here is whether the employer's action (here, maintenance of the Agreement) has a reasonable tendency to restrict or coerce Section 7 rights, not whether a particular employee is actually coerced. Similarly, evidence of enforcement is not required; the Board may conclude that maintenance of a work rule is unlawful absent any evidence of enforcement. *Flex Frac*, 746 F.3d at 209.

Next, the Company contends (Br. 26) that employees would reasonably interpret the Agreement – with its multiple references to a "court" and discovery – as referring only to claims that can be decided in court and not as excluding administrative charges with the Board. But references to a "court" do not overcome the breadth of the Agreement's definition of covered claims, which includes "claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy." (CER 14; 63, 65.) A reasonable employee would understand a Board unfair-labor-practice hearing, over which an administrative law judge presides and both parties present testimony according to the Federal Rules of Evidence, to be a form of court hearing. For example, in *U-Haul*, which the Board quoted (CER 2-3), the Board found a

violation where the arbitration agreement applied only to "disputes, claims or controversies that a court of law would be authorized to entertain," reasoning that the reference to a court of law "did nothing to clarify that the arbitration policy does not extend to the filing of unfair labor practice charges." 347 NLRB at 377-78 (2006). The Board in *U-Haul* also observed that "decisions of the [Board] can be appealed to a United States court of appeals," on which judges sit. *Id*. at 377. Moreover, ambiguities in an employment policy are construed against the promulgator of that policy. *See Lafayette Park Hotel*, 326 NLRB at 828. It was therefore reasonable for the Board to conclude that an employee would understand the Agreement as encompassing Board charges, even absent any explicit mention of administrative agencies.

The Company claims (Br. 29) that *U-Haul* is distinguishable because the policy at issue there "broadly covered all 'legal or equitable claims and causes of action recognized by local, state or federal law or regulations.'" But the Company does not explain how that statement is somehow broader than the Agreement's language covering "claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy." (CER 1 n. 3.) Indeed, the two clauses are nearly identical.

Finally, the Company misplaces its reliance on *Supply Technologies, LLC*, 359 NLRB No. 38 (2013). That decision is non-precedential because the Board

panel deciding that case included two members whose recess appointments were invalidated in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). In any event, that case is distinguishable. The arbitration agreement at issue listed three specific exceptions to its arbitration mandate; none of which included the filing of Board charges. *Id.* at *2. The Company claims that because its Agreement does not include such exceptions, it cannot reasonably be read to prohibit filing Board charges. But that conclusion does not follow from its premise: simply because the Agreement lacks exceptions to arbitration does not mean that its broadly requiring arbitration of all "claims for violation of any federal . . . statute" would not be reasonably read to prohibit filing Board charges.

B. All Three Entities Are Liable for Violating Section 8(a)(1)

The Board properly found that all three entities, CHL, CFC, and BOA violated Section 8(a)(1) by maintaining and enforcing the Agreement. The Company's claim (Br. 46) that CFC and BOA should not be liable because neither entity directly employed Whitaker or White is contrary to settled precedent. The Board and courts, relying on the Act's broad definition of employer (*see* 29 U.S.C. § 152(2)) have consistently held that a statutory employer "may violate 8(a)(1) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship." *New York New York Hotel & Casino*, 356 NLRB 907, 911 (2011), *enforced*, 676 F.3d

193 (D.C. Cir. 2012). Thus, an employer "may violate § 8(a)(1) with respect to employees other than his own." *Hudgens v. NLRB*, 424 U.S. 507, 510 fn. 3 (1976). The Company offers no reason why BOA and CFC do not meet the Act's broad definition of employer.

Moreover, CFC and BOA were plainly involved in maintaining and enforcing the Agreement. As the Board explained, "the three [entities] joined together and were active participants in seeking to enforce the Agreement in Federal court." (CER 1, n.2.) CFC authored the Agreement, and BOA, as CHL's parent company, is an "affiliated entity" to whom the Agreement applies. (*Id.*)

No more availing is the Company's claim that because a federal court found that Bank of America has no successor liability for the other two entities' actions, it likewise has no such liability here. (Br. 47-48.) It is under the NLRA's broad definition of "employer," not under the successor liability theory litigated in federal court, that the Board held all three entities liable for their maintenance and enforcement of the Agreement. Therefore, the Board appropriately held all three entities liable.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

STATEMENT OF RELATED CASES

The following cases all raise the same or closely related issue of whether an arbitration agreement that waives employees' Section 7 right to concerted legal action violates Section 8(a)(1) of the NLRA. All cases are currently pending in this Court, and to Board counsel's knowledge, this list is exhaustive as of June 3, 2016:

Morris v. Ernst & Young, LLP, 13-16599

Countrywide Financial Corp. v. NLRB, 15-72700

Nijjar Realty, Inc. v. NLRB, 15-73921

Philmar Care, LLC v. NLRB, 16-70069

CPS Security (USA), Inc. v. NLRB, 16-70488

Century Fast Foods, Inc. v. NLRB, 16-70686

Network Capital Funding Corp. v. NLRB, 16-70687

FAA Concord H, Inc. v. NLRB, 16-70694

Apple American Group, LLC v. NLRB, 16-70816

The Pep Boys Manny Moe & Jack of California v. NLRB, 16-71036

Kenai Drilling, Ltd. v. NLRB, 16-71148

Bloomingdale's, Inc. v. NLRB, 16-71338

Ralph's Grocery Co. v. NLRB, 16-71422

Covenant Care California, LLC v. NLRB, 16-71502

Valley Health System, LLC v. NLRB, 16-71647

Respectfully submitted,

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National Labor Relations Board
June 15, 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTRYWIDE FINANCIAL CORP., et al.	*	
	*	Nos. 15-72700,
Petitioners/Cross-Respondents	*	15-73222
	*	
v.	*	
	*	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	*	31-CA-072916,
	*	31-CA-072918
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,953 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 15th day of June, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 15th day of June, 2016